Supreme Court, U.S.
FILED
NOV 8 - 2004
OFFICE OF THE CLERK

No. 04- 04-633

IN THE

Supreme Court of the United States

DAVID ROYCE PRATT,

Petitioner,

v.

MIKE NELSON, *et al.*, Warden, El Dorado Correctional Facility;
CARLA STOVALL, Kansas Attorney General,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

ROGER L. FALK*
CHRISTOPHER L. HUGHES
THE LAW OFFICE OF
FALK & OWENS, P.A.
301 West Central
Wichita, Kansas 67202-1077
(316) 265-5115

* *Counsel of Record*

Counsel for Petitioner

190796

COUNSEL PRESS
(800) 274-3321 • (800) 359-6859

QUESTIONS PRESENTED

The Tenth Circuit granted a Certificate of Appealability on the issue of ineffective assistance of counsel, following the denial of the Petitioner's Petition for a Writ of Habeas Corpus filed pursuant to 28 U.S.C. § 2254. Petitioner raised the following issues with respect to the effectiveness of counsel: (1) counsel failed to move for suppression of the Petitioner's custodial statements; (2) counsel failed to request a jury trial and adequately explain the jury trial right to the Petitioner; (3) counsel failed to move for suppression of the "scientific" evidence collected; (4) counsel failed to adequately challenge the introduction of accomplice statements and appellate counsel failed to raise the issue on appeal. The Tenth Circuit affirmed the decision of the District Court finding that counsel was not ineffective.

The question presented is as follows: Did trial and appellate counsel fail to provide effective assistance of counsel as required by the Sixth Amendment to the Constitution of the United States?

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OPINIONS BELOW

The opinion below, *Pratt v. Nelson*, (10th Cir. August 10, 2004, No. 03-3130) is attached as Appendix A. Mr. Pratt's direct appeal was filed in *State v. Pratt*, 255 Kan. 767, 876 P.2d 1390 (1994). Mr. Pratt filed an appeal of the Sedgwick County District Court's denial of relief, pursuant to K.S.A. 60-1507, recorded in an unpublished opinion, *Pratt v, State*, Kansas Court of Appeals No. 79,484, attached as Appendix C. The United States District Court, District of Kansas, denied Mr. Pratt's Petition for a Writ of Habeas Corpus, filed pursuant to 28 U.S.C. § 2254, on March 28, 2003. A copy of the order is attached as Appendix B (District of Kansas, No. 99-CV-3321-SAC)

STATEMENT OF JURISDICTION

The opinion of the Court of Appeals, (Appendix A) was decided on August 10, 2004. The jurisdiction of this Court is invoked pursuant to Title 28, United States Code § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

United States Constitution, Amendment VI. Jury trials for crimes, and procedural rights.

> In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses

against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defence.

Title 28, United States Code, Section 2254(a)

State custody; remedies in Federal courts.

(a) The Supreme Court, a Justice thereof, a circuit judge, or a district court shall entertain an application for a writ of habeas corpus in behalf of a person in custody pursuant to the judgment of a State court only on the ground that he is in custody in violation of the Constitution or laws or treaties of the United States.

STATEMENT OF THE CASE

The Petitioner, David Royce Pratt, asserts in this case that he did not receive the effective assistance of counsel as required by the Sixth Amendment to the United States Constitution and applied to the various States through the Fourteenth Amendment, and that, through the denial of this fundamental constitutional right, various other of his constitutional rights were violated, including his right to a fair trial.

David Royce Pratt, was charged with 17 felonies, all of which arose from two separate and distinct incidents, which occurred on September 21 and 26, 1991. (App. V. 1, p. 37). The Petitioner was convicted in the District Court of Sedgwick County, Kansas of aggravated burglary, aggravated criminal sodomy, rape, attempted rape, aggravated kidnapping, aggravated robbery and aggravated battery. As a result of said convictions, David Royce Pratt is serving two consecutive life sentences.

Darron Edwards, who also participated in the September 21, 1991 crimes, pled guilty prior to trial, as did Michael Graff, who participated in the September 26, 1991 crimes. (App. V. VI, pp. 950-51). Darron Edwards was sentenced to life plus a term of twenty years to life. (App. V. VI, p. 950). Michael Graff received a forty-five years to life sentence. (App. V. VI, p. 951).

Facts Relevant to September 21, 1991 Incident

The evidence at trial showed that on September 21, 1991, Darron Edwards and a white male entered the residence of M.C. and her mother R.C. (App. V. III, pp. 343, 349). M.C. testified that one of the intruders was a black male and the other was a white male, and that the white man struck her in the face twice with his fist. (App. V. III, pp. 353-54). R.C.'s hands were tied with electric cord. (App. V. II, p. 257). She was pushed down on the bed. (App. V. II, p. 258). Her daughter untied the electric cord. (App. V. II, p. 259).

M.C. further testified that Darron Edwards raped and sodomized her in her mother's bedroom during which time the white man searched other rooms in the house and, later, stood at M.C.'s head while Darron Edwards was assaulting her. (App. V. III, pp. 355-57, 360, 361). M.C. testified that when the events occurred inside her home, there was no artificial lighting on in the house and that after she had walked down the stairs, one of the suspects had pulled her glasses off her face. (App. V. III, pp. 394-96). After she was struck in the face, her eyes began to swell, further obstructing her vision. (App. V. III, p. 399). M.C. testified that Edwards then pushed the women out the back door of the house, the white man in front, followed by the two women, with Darron Edwards pushing M.C. from behind. (App. V. III, pp. 364-

65). R. C. testified, "I had to get in on the left side and the left of my knee I can't raise up to move in . . . He pushed the door shut on my leg. And that's why my leg was black and blue all the way down . . ." (App. V. II, p. 260). R.C. also testified that she believed her arm was cut by the cords. R.C. did not notice the cuts until she got to the hospital. (App. V. II, p. 261). They took eight stitches to close them. (App. V. II, pp. 259, 261) Treatment to R.C.'s leg consisted of x-rays and they couldn't find any broken leg but it was bad bruises all the way down, black and blue (App. V. II, p. 262). Other than the injuries to her arms and what happened to her leg, neither man did anything else to her. They just told her to keep still and she did. (App. V. II, p. 262).

Darron Edwards then drove the four from the residence in M.C.'s car. (App. V. III, pp. 367-75). The white man stated that he wanted to get out of the car, but Darron Edwards told him to wait awhile. (App. V. III, p. 375). When Darron Edwards stopped at a red light in Wichita, the white man got out of the car saying that he was sick. (App. V. III, p. 375).

After the white man left the car, Darron Edwards drove the vehicle, with M.C. and R.C., to Emporia. (App. V. III, pp. 378-79, 381). During the crimes, Darron Edwards made several threats to M.C. that if she did not do what he said, he would hurt her mother. (App. V. III, pp. 388-89). Edwards asked for directions toward the turnpike and Topeka. (App. V. III, p. 402). M.C. testified that she believed that both suspects where under the influence of alcohol. (App. V. III, p. 408). As Edwards drove the victims from El Dorado to Emporia, he told M.C. to tell the police that Edwards did not beat them. (App. V. III, p. 382). Mr. Pratt's counsel objected to this statement as hearsay, and the trial Court overruled defense counsel's objection on hearsay grounds. (App. V. III, p. 382; V. V, p. 830).

Facts Relevant to September 26, 1991, Incident

The evidence showed that on September 26, 1991, Michael Graff knocked on the door of the residence of Omer and Mina Lindamood, claiming that his car had broken down and that he needed to use the phone. (App. V. III, pp. 486, 490). Mr. Lindamood testified that as he opened the back door to let Michael Graff out of the house, another man approached the door. Mr. Graff told this man to "take care of this fellow so he don't make any noise." (App. V. III, pp. 493-94). Mr. Lindamood testified that the second man then entered the house, struck Mr. Lindamood in the face with a gun stock, knocking Mr. Lindamood unconscious. (App. V. III, p 494-95).

Mr. Lindamood testified that he didn't believe he could identify the second suspect, was not certain as to the suspects' heights and would be guessing at it. (App. V. III, p. 503-04, 509). He testified that he was certain that the individual who struck him with the gun held it in his right hand. (App. V. III, p. 517).

Gary L. Miller, a police examiner for the Wichita Police Department testified that he was asked to examine a shoe print impression taken at the M.C. and R.C. residence. (App. V. IV, pp. 576, 580). He testified that he was unable to positively identify the lifts of the shoe impressions as coming from a pair of boots offered by the State as exhibit 134. (App. V. IV, pp. 584-85). Mr. Pratt's trial counsel unsuccessfully moved to strike Miller's testimony on relevance grounds. (App. V. IV, p. 586). The state also offered the testimony of Mary Ayers, a police department chemist regarding blood evidence and a whiskey bottle taken from the M.C. and R.C. residence. (App. V. IV, pp. 605, 608).

She testified that she does not have the expertise to make an absolute identification that blood evidence that she tests comes from a certain individual. (App. V. IV, pp. 615-16). Mr. Pratt's trial counsel reserved his objection to Ms. Ayers' report. (App. V. IV, pp. 609-10). Ms. Ayers testified that her analysis of the whiskey bottle indicated that, because it did not contain evidence of any blood group substances, that it had been used by a "nonsecretor". (App. V. IV, pp. 612-13). Her analysis of blood samples taken from David Pratt indicated that he was a nonsecretor. She testified that twenty percent of the population are nonsecretors. (App. V. IV, p. 614). She also testified that David Pratt is an ABO type A-1, Lewis A positive B negative. (App. V. IV, p. 612). She testified, however, that even an O secretor may have used the bottle because O secretors do not secrete heavily and, therefore, may not leave sufficient blood group substances which would appear on an evidence sample. (App. V. IV, pp. 614-15).

Detective John Horn, a print examiner for the Wichita Police Department testified that a fingerprint taken from the driver's side rear door window of M.C.'s car, was "comparable" to a print of David Pratt. (App. V. IV, pp. 598-600). Detective James Fullerton testified that no identifiable prints were taken at the Lindamood crime scene. (App. V. IV, p. 641).

Officer Jeffrey R. Petro, a Wichita Police Officer, testified that on September 26, 1991, he arrested Moses Jackson, and when inventorying his car, discovered a broken rifle or shotgun stock stuffed between the driver's and passenger seat. (App. V. IV, pp. 655, 657-59). Jackson appeared to be intoxicated. (App. V. IV, p. 664).

Michael Hennessy, a Wichita Police Department Investigator, testified that it was not possible for him to determine whether a piece of wood recovered at the Lindamood residence was a piece of wood broken off a rifle or shotgun. (App. V. IV, pp. 684-85, 687). Randy Lawson, a Wichita Police Department Detective, testified that because there was no butt remaining on the shotgun, it was impossible to do a fracture analysis to show whether the wood splinter recovered at the Lindamood residence was broken off that particular gun. (App. V. IV, pp. 689, 695).

Detective Lawson testified that he took a statement from Moses Jackson, wherein Jackson stated that when Michael Graff and David Pratt returned to the vehicle, it was Michael Graff holding the broken shotgun stock. (App. V. IV, pp. 696, 700). Jackson told Lawson that David Pratt said that Michael Graff had beaten the victims. (App. V. IV, p. 701). David Pratt's trial counsel asked Detective Lawson about the contents of statements Lawson took from Moses Jackson and Michael Graff. (App. V. IV, pp. 696-98, 701-02).

Mr. Pratt's trial counsel also asked Detective Lawson whether Michael Graff had a history of battery arrests, to which the prosecutor objected. (App. V. IV, pp. 702-03). The court sustained the objection, after which Mr. Pratt's trial counsel made an offer of proof that Michael Graff had been arrested on at least one occasion for battery. (App. V. IV, pp. 704-05).

During her redirect examination of Detective Lawson, the prosecutor asked Detective Lawson what Moses Jackson had told him about what had occurred at the Lindamood house, to which Mr. Pratt's trial counsel objected. (App. V. IV, p. 711). The objection was overruled. (App. V. IV, p. 716).

The prosecutor later asked Detective Lawson what Michael Graff had told him about the incident, to which defense counsel objected. (App. V. IV, pp. 719-20). This objection was also overruled. (App. V. IV, p. 720). Detective Lawson admitted that when David Pratt made the statement to Moses Jackson that Michael Graff had beaten the victims, that statement was in confidence to an acquaintance or friend. (App. V. IV, p. 726).

At the preliminary hearing, Detective Scott Wiswell testified that he took a statement from David Pratt, after reading him his Miranda rights, and without threats, promises or physical abuse. (App. V. II, pp. 274-75). Wiswell further testified that David Pratt told him that he had taken drugs on the day the statement was taken. (App. V. II, p. 287). Pratt's attorney brought an oral Motion to Suppress the statement:

> . . . [M]y client indicates to these two detectives that he had taken drugs on the very day he gave this statement, and for that reason, in addition to several other reasons, I ask the court to withhold any determination of admissibility until I got across [sic] to cross-examine in voir dire. We are going to make a strong argument to the court that this tape should not admitted for that reason.

(App. V. II, pp. 283-84, V. II, pp. 295-97, V. IV, pp. 740-42, 745)

The defense motion was denied, the tape was played for the Court, and a transcript of the tape was admitted. (App. V. IV, p. 746).

When the prosecutor attempted to introduce evidence of this same statement taken from David Pratt by Detective Wiswell, at the bench trial in this matter, defense counsel again objected to its admission into evidence, on the grounds that Mr. Pratt had smoked marijuana on the day that the statement was taken. (App. V. IV, pp. 741-42, 746). The objection was overruled. (App. V. IV, p. 742). Detective Wiswell also testified that sometimes suspects who are questioned regarding crimes which occurred while they were under the influence of drugs or alcohol do not recall all the events that occurred. (App. V. V, pp. 768-69). Defense counsel asked Detective Wiswell whether he was aware that Darron Edwards' girlfriend had made an allegation that Edwards had raped and beaten her, to which the prosecutor objected. (App. V. V, pp. 776-77). The objection was sustained. (App. V. V, p. 777). Detective Wiswell testified that he observed David Pratt's physical condition during the interview, including his stiff neck position. (App. V. V, p. 784).

At the close of the state's case, defense counsel reiterated his previous objections to the state's evidence. (App. V. V, p. 791).

Darron Edwards was called as a defense witness, but pleaded the Fifth Amendment after previously agreeing to testify against David Pratt as part of a plea agreement. (App. V. V, pp. 824-25). At the time of Mr. Pratt's trial, the denial of Darron Edward's motion to withdraw his guilty plea was on appeal. (App. V. V, p. 826).

Dr. R. Burnley-White, testified as an expert for the defense. (App. V. V, p. 832). Dr. White testified that he was certified in addictive medicine by the American Board of

Family Practice. (App. V. V, p. 832). Dr. White testified that he examined medical records of, and personally examined, David Pratt. (App. V. V, p. 842). David Pratt told Dr. White that on the dates of the incidents, he took anything he could get a hold of including his favorites, butane, marijuana, cocaine, intravenously, alcohol and amphetamines. (App. V. V, p. 849, 857-58, 879-80).

Dr. R. Burnley-White testified that a person consuming alcohol and cocaine becomes overly active and is unaware or unable to remember what he said or did or what he planned to do. (App. V. V, p. 869). Dr. White testified that regarding the criminal incidents, David Pratt was either "ignoring it" or had no memory recall of the event because of the effect of the alcohol and drugs he had been using at those times. (App. V. V, p. 870). His opinion was that David Pratt was unable to establish an intent to commit the crimes because he was too ill from drug and alcohol abuse. (App. V. V, p. 875).

Dr. White testified that from visiting with David Pratt, and reviewing his life history he was able to predict with some certainty how Mr. Pratt would perform under the influence of various chemicals. (App. V. V, p. 894). His physical examination of David Pratt showed that David had no rotation of the cervical spine, had minimal flexibility of his right pectoral, or the right side of his pectoral girdle, and that Pratt's physical condition was consistent with ankylosis spondylitis. (App. V. V, p. 902).

Prior to his trial David Pratt's right to a jury trial was waived after the following:

> The Court: I'm told, Mr. Pratt, that you want to waive your right to jury trial on this case that

> was filed against you. If you do, you have given up the right to have a jury decide if you are guilty or not-guilty and have the trial decided before a judge; and is that what you want to do?
>
> The defendant: Yes I do. (App. V. II, p. 326).

Defense counsel filed an appeal which was denied by the Supreme Court. (*State v. Pratt*, 255 Kan. 767, 876 P.2d 1390 [1994]; App. V. I, pp. 33-41). Defense counsel filed a brief and listed numerous issues which he did not brief or argue. (App. V. I, pp. 156-58; *State v. Pratt*, 255 Kan. 767, 876 P.2d 1390 [1994]). The Court deemed these issues to have been abandoned. (*State v. Pratt*, 255 Kan. at 773). Therefore, appellate counsel only briefed and argued the issue of sufficiency of the evidence.

On April 18, 1997, Mr. Pratt filed a Motion pursuant to K.S.A. 60-1507, which was summarily denied, without hearing, by the Honorable Paul W. Clark, on June 4, 1997. Mr. Pratt challenged his convictions on the basis of ineffective assistance of counsel as well as his waiver of jury trial. Mr. Prat also challenged the effectiveness of appellate counsel. David Pratt appealed the trial Court's summary denial of his Motion for relief to the Kansas Court of Appeals. (App. V. I, pp. 42-43). The Kansas Court of Appeals affirmed the trial Court's decision, and Mr. Pratt filed a Motion for Review before the Kansas Supreme Court. Petitioner's Motion for Review was denied on September 28, 1999. (App. V. I, p. 55)

On October 4, 1999, Mr. Pratt filed a Petition for a Writ of Habeas Corpus in the United States District Court for the District of Kansas. (App. V. I, p. 11). In his Petition,

Mr. Pratt challenged his convictions on the following grounds: (1) insufficiency of the evidence; (2) erroneous admission of involuntary custodial statements of Mr. Pratt; (3) denial of right to discover exculpatory evidence; (4) erroneous admission of prejudicial photographs; (5) erroneous admission of irrelevant and prejudicial expert testimony; (6) denial of Mr. Pratt's right to confrontation under the Sixth Amendment; (7) ineffective assistance of counsel; and (8) Mr. Pratt's sentence was constitutionally excessive.

On March 28, 2003, the District Court denied relief and dismissed the petition. (App. V. I, p. 159). Mr. Pratt filed a notice of appeal on April 25, 2003. (App. V. I, p. 174). The Tenth Circuit affirmed the decision of the District Court on August 10, 2004.

REASONS FOR GRANTING THE PETITION

In denying habeas relief to the Petitioner, the United States District Court for the District of Kansas ruled that the Petitioner had procedurally defaulted several issues, including two of his sub-issues regarding effective assistance of counsel. The Petitioner had relied on the fact that appellate counsel had asserted certain issues in the Petitioner's brief but then failed to adequately brief those issues to preserve them for judicial review. The United States District Court found that the Kansas Court of Appeals had applied the appropriate standard of review for evaluating claims of ineffective assistance of appellate counsel.

The District Court stated, "[a]ppellate counsel need not (and should not) raise every nonfrivolous claim, but rather may select from among them in order to maximize the

likelihood of success on appeal. *Smith v. Robbins*, 528 U.S. 259, 288 (2000)." (Appendix B, p. 9). However, the Petitioner respectfully asserts that the District Court relied too heavily on that statement without applying it reasonably to the facts of his case. Appellate counsel effectively only raised the issue of sufficiency of the evidence and briefed no other issues.

The precedent from this Court is clear, appellate counsel is ineffective when he ignores issues that are clearly stronger than those actually presented. *Smith v. Robbins*, 528 U.S. 259, 288, 120 S. Ct. 746, 765, 145 L. Ed. 2d 756 (2000). The Petitioner's arguments with regard to the Confrontation clause (as an example) were clearly much stronger than an argument revolving around sufficiency of the evidence. To be fair, the District Court also ruled that appellate counsel had not properly supported the claim of ineffective assistance of appellate counsel on collateral appeal. However, the United States District Court addressed the issue on the merits. The Tenth Circuit summarily affirmed the decision of the District Court. The Petitioner respectfully asserts that the District Court essentially applied the wrong test to the effective assistance of counsel claim in not considering the relative strengths of the claim raised versus those not raised. Therefore, in light of the unreasonable application of clearly established federal law, this Court should grant review.

I. Mr. Pratt Was Denied His Sixth Amendment Right To The Effective Assistance Of Counsel.

A. The Standard of Review

The Sixth Amendment right to counsel is the right to the effective assistance of counsel, and the standard or test for judging any claim of ineffectiveness is whether counsel's

conduct so undermined the proper functioning of the adversarial process that the trial cannot be relied upon as having produced a just result. *Strickland v. Washington*, 466 U.S. 668, 686, 880 L. Ed. 2d 674, 104 S. Ct. 202 (1984).

Before counsel's assistance is determined to be so defective as to require reversal two components must be shown: (1) Mr. Pratt must show that counsel's performance was deficient; and (2) that said deficiency prejudiced the defense. The first component requires a showing that "counsel was not functioning as the 'counsel' guaranteed the defendant by the Sixth Amendment." *Strickland v. Washington*, 466 U.S. at 687. The second component requires a showing that counsel's deficiencies were so severe as to deprive the defendant of a fair trial. *Id.* at 687. The proper standard for determining counsel's performance is that of reasonably effective assistance, considering all the circumstances. This means Mr. Pratt must show that counsel's representation fell below an objective standard of reasonableness. *Id.* at 687.

Judicial scrutiny of counsel's performance is highly deferential. Every effort must be made to eliminate the distorting effects of hindsight, reconstruct the circumstances surrounding counsel's conduct and evaluate that conduct from counsel's perspective. *Id.* at 689. A court must indulge a strong presumption that counsel's performance falls within a wide range of professional assistance.

It is incumbent upon a defendant to make a showing that he was somehow prejudiced by counsel's representation. Regarding the required showing of prejudice, the proper standard requires a defendant to show that there is a reasonable probability that, but for counsel's unprofessional

errors, the result of the proceeding would have been different. A "reasonable probability" is a probability sufficient to establish a lack of confidence in the Court as to what the outcome of the proceeding would have been, absent any mistakes by counsel. In other words, the court should address what the actual effect of the alleged errors, made by counsel, had on the outcome of the proceeding. *Id.* at 691-92.

"A defendant need not show that counsel's deficient conduct more likely than not altered the outcome of the case." *Strickland*, at 693. ". . . [A] defendant need not establish that the attorney's deficient performance more likely than not altered the outcome in order to establish prejudice under *Strickland*." *Nix v. Whiteside*, 475 U.S. 157, 175, 106 S. Ct. 988, 89 L. Ed. 2d 123 (1986). "The question is not whether the defendant would more likely than not have received a different verdict with the evidence, but whether in its absence he received a fair trial, understood as a trial resulting in a verdict worthy of confidence." *Kyles v. Whitley*, 514 U.S. 419, 434, 115 S. Ct. 1555 (1995).

B. Trial counsel's failure to properly challenge admission of custodial statements.

Defense counsel failed to move for suppression of Mr. Pratt's statement to Detective Wiswell prior to trial, and as a result of their failure to so move, the statement was admitted into evidence. Failure of trial counsel to seek suppression of Mr. Pratt's alleged confession amounts to ineffective assistance of counsel. The Fifth and Fourteenth Amendment violations underlying this claim are more fully set forth above, and said arguments are hereby incorporated by reference.

In the present case, defense counsel did not file a written suppression motion as required by Kansas law. However, at trial, counsel attempted to suppress Mr. Pratt's custodial statement. The failure to file a suppression motion does not constitute per se ineffective assistance of counsel. *Kimmelman v. Morrison*, 477 U.S. 365, 384, 106 S. Ct. 2574, 91 L. Ed. 2d 305 (1986). This failure cannot be explained away as trial strategy because counsel did in fact try to suppress the statement, using an improper procedure. As a result, no separate hearing was held under *Jackson v. Denno* to test the voluntariness of Mr. Pratt's custodial statement.

In *Kimmelman v. Morrison*, defense counsel failed to file a motion to suppress evidence obtained through an illegal warrantless search. The U.S. Supreme Court found this was not a strategical decision, but rather through counsel's failure to conduct independent investigation and make formal discovery requests. This conduct was found to be unreasonable, and as the Fourth Amendment claim was meritorious, prejudicial to the defendant.

Mr. Pratt acknowledges this case is factually distinguishable from his claim in that Morrison's trial counsel entirely failed to conduct investigation and seek discovery in the case. However, they are alike in that counsel did try to suppress the evidence when he learned of it, but failed due to ignorance of the proper procedures under state law. Had Mr. Pratt's trial counsel filed a timely motion to suppress, a separate hearing would have been conducted to test the voluntariness of his statements to the police, and those statements would have been suppressed.

Absent Mr. Pratt's custodial statements (and those of his alleged accomplices), there would have been no evidence

linking Mr. Pratt to the crimes. Under these circumstances, counsel's unreasonable conduct resulted in prejudice to Mr. Pratt in that, absent the challenged evidence, a reasonable fact finder very well could have acquitted him. As stated before, it is not necessary for Mr. Pratt to show that the result would have been different, but that he did not receive a fair trial, understood as a trial resulting in a verdict worthy of confidence.

C. Trial counsel's failure to adequately advise the Petitioner of his constitutional right to a jury trial.

In the present case, defense counsel waived the Mr. Pratt's right to a trial by jury. The only inquiry made of Mr. Pratt, by the trial Court was the following:

The Court: I'm told, Mr. Pratt, that you want to waive your right to a jury trial on this case that was filed against you. If you do, you have given up the right to have a jury decide if you are guilty or not guilty and have the trial decided before a judge; and is that what you want to do?

The Defendant: Yes I do.

Prior to Mr. Pratt's waiver of this very significant right, his trial counsel failed to discuss the ramifications of such a waiver with him. In addition, they failed to discuss their reasoning for such a waiver. In light of these circumstances, how can this be an effective waiver?

Federal standards govern whether the waiver of a federal constitutional right is effective. *Douglas v. Alabama*, 380 U.S. at 422. Of course, the ultimate decision to waive the right to a jury trial is the defendant's. *Jones v. Barnes*, 463 U.S. 745, 751, 103 S. Ct. 3308, 77 L. Ed. 2d 987 (1983). Waiver in this context is "an intentional relinquishment or abandonment of a known right or privilege." *Johnson v. Zerbst*, 304 U.S. 458, 464, 58 S. Ct. 1019, 82 L. Ed. 1461 (1938).

The average criminal defendant does not possess the professional legal skill to protect himself when charged with a crime. What may appear to be very simple to a lawyer may appear intricate, complex and mysterious to the untrained layman. *Schneckloth v. Bustamonte*, 412 U.S. 218, 236, 93 S. Ct. 2041, 36 L. Ed. 2d 854 (1973). In this instance, counsel was basing their decision on the number of prejudicial photographs that would be admitted. Counsel's failure to fully advise Mr. Pratt of his rights in this regard was unreasonable. As a result, Mr. Pratt gave up an important trial right without understanding that right.

D. Trial counsel's failure to move to suppress the "scientific" evidence presented by the State.

Defense counsel filed no motions in an effort to exclude or limit the DNA and other "scientific" evidence which was offered at the time of trial in this matter. The trial Court admitted the testimony of Mary Ayers, a Wichita Police Chemist. She testified that she tested the blood and saliva samples from the C. residence, but that she was unable to make a positive identification on either. She testified that a whiskey bottle found in the residence was used by someone who was a "nonsecretor" and that 20% of the population are

"nonsecretors." Ms. Ayers further testified that an O blood type may have used the whiskey bo"le found at that residence, and that Mr. Pratt had ABO type A-1 blood. She further testified that even an O secretor may have used the bottle, because O secretors do not secrete heavily.

The blood and saliva evidence was irrelevant in determining David Pratt's guilt, but, more significantly, was speculative and prejudicial against him. Despite the lack of relevance or scientific certainty which could have probative value in the case, David Pratt's trial counsel did nothing to stop the admission of this testimony. Instead, her testimony was admitted. As "scientific evidence", it carried with it a "veil of certainty," even though all it proved was that David Pratt could not be eliminated from a pool of suspects. Mr. Pratt's trial counsel was ineffective in failing to challenge this additional evidence against his client.

E. Appellate counsel's failure to sufficiently brief the issues.

On his direct appeal Mr. Pratt raised three separate issues, all going to the sufficiency of the evidence to convict him. The first issue raised on direct appeal dealt with the sufficiency of the evidence to sustain the convictions in Counts 1, 3, 6, 11, 14 and 16, all of which were "specific intent crimes." Mr. Pratt argued on direct appeal that he lacked the required intent to commit these crimes because of his level of intoxication at the time of their commission, relying upon the uncontroverted testimony of Dr. R. Burnley White. (App. V. I, pp. 154-55)

In the second issue on direct appeal Mr. Pratt argued that the convictions on Counts 4 and 5 could not stand

because they were also specific intent crimes. Mr. Pratt argued, through appellate counsel, that he could not be convicted as the principal offender on these two counts because it was uncontroverted that the "black man," i.e, Darron Edwards, had committed the rape and sodomy of M.C. Therefore, if Mr. Pratt was to be found guilty of these two counts, he must be found guilty as an "aider and abettor" under K.S.A. 21-3205. This transforms an offense which otherwise does not require a "specific intent" into a "specific intent" crime. (App. V. I, pp. 154-55)

The third issue raised on direct appeal went to the attempted rape charge found in Count 7, for the attempted Rape of M.C. on the Kansas Turnpike, between El Dorado and Wichita. Again, the evidence is uncontroverted that Darron Edwards committed this attempted rape, at a time when the Defendant had already exited the vehicle, back at a stop light in Wichita, Kansas, before the vehicle ever got onto the Kansas Turnpike. Mr. Pratt argued that due to his "withdrawal" from the criminal enterprise, he could not be held criminally responsible for the acts of Darron Edwards after he exited the vehicle. Mr. Pratt further argued, through his appellate counsel, that even if could be found liable as an "aider and abettor," this was a specific intent crime, requiring that he have the intent to aid or assist in these crimes. This was a specific intent which he could not form due to his voluntary state of intoxication on the evening in question. (App. V. I, pp. 155-56)

The Appellant's Brief to the Kansas Supreme Court then goes on to list ten (10) issues, without any authority or argument for the same. In this regard, the Appellant's (Petitioner's) Brief on Direct Appeal, states the following:

IV. DAVID PRATT RESERVES ALL OTHER TRIAL OBJECTIONS IN HIS REQUEST FOR A NEW TRIAL AND MODIFICATION OF SENTENCES, WHICH INCLUDE BUT ARE NOT LIMITED TO THE FOLLOWING:

There is no evidence to support Count 12, as the State's own evidence showed that in fact the alleged shotgun was not loaded and likely was used by someone other than David Pratt in the commission of said offense and was not a dangerous weapon.

The evidence presented does not support the finding David Pratt was one and the same person allegedly inflicting bodily harm as set out in the State's Counts 14 and 16.

The Court denied David Pratt a fair trial and due process as a result of certain evidentiary and other rulings as specified hereafter:

1. The Court's admission into evidence of David Pratt's custodial statement to Detectives Scott Wiswell and Randy Lawson was not the product of a knowing and voluntary statement as required by law.

2. The Court's failure to order the disclosure of the complete criminal histories/arrests and conviction records of the Co-Defendants Michael Graff, Darron Edwards and Moses Jackson, denied David Pratt exculpatory evidence as mandated by the law of discovery in criminal cases, Brady v. Maryland and other relevant case law.

3. The admission at various times of hearsay statements of Michael Graff and Darron Edwards inculpating

David Pratt without affording David Pratt the opportunity to confront and cross-examine said Michael Graff and Darron Edwards.

4. The admission of Michael Graff's hearsay conversations with Detective Lawson inculpating David Pratt without opportunity to examine Michael Gaff.

5. The admission into evidence of multiple photographs which were repetitive and cumulative and which were both gruesome and inflammatory, the same photographs being offered to arouse sympathy and passion in the Court to prejudice David Pratt before the Court, and in certain instances said photos pertained only to conduct of Co-Defendants, not the conduct of David Pratt.

6. The Court received both testimony and physical evidence of a highly speculative and prejudicial nature bases upon the State's alleged expert witnesses which prejudiced David Pratt and which was not relevant nor material to David Pratt.

7. David Pratt was prejudiced and unable to receive a fair trial by reason of the Sheriff's Office ex-parte communication with the Court.

8. All previous objections by David Pratt as to all rulings by the Court as reflected in the proceedings herein.

This is the only argument present on these issues. None of the issues thus raised were briefed and none were

argued on direct appeal. As a result, the Kansas Supreme Court ruled that, "For his final contentions, the Defendant lists 10 other issues. These issues were neither briefed nor argued and we accordingly, deem them to have been abandoned." (App. V. I, pp. 41). Surely if it was worth the time and effort to list these issues, it was worthwhile to brief and argue them as well. Further, it is logical to assume that appellate counsel's failure to raise some of the current issues is equally egregious.

David Pratt was convicted of eleven crimes and sentenced to two life sentences. It is difficult to comprehend how so many trial errors could go unrecognized, or could be deemed unimportant, in such a serious case. If these issues were worth listing in the appellate brief, then surely they were worth briefing. It is at the appellate level that the defendant has, perhaps, his last opportunity to challenge trial errors. Appellate counsel's failure to do so constituted ineffective assistance.

Surely appellate counsel owes his client more than a sufficiency of the evidence argument when handling a direct appeal, and his failure to do so here constitutes a failure to "subject the prosecutors case to meaningful adversarial testing," as contemplated in *United States v. Cronic*, 466 U.S. 648, 104 S. Ct. 2039 (1984). In this regard, the U.S. Supreme Court decided, not long after its decisions in *Cronic* and *Strickland*, that the right to the effective assistance of counsel extended beyond the right to effective assistance at the trial court level, to include the right to the effective assistance of counsel on a direct appeal as well.

In this regard, the Court in *Evitts v. Lucey*, 469 U.S. 387, 105 S. Ct. 830, 83 L. Ed. 821 (1985) examined the right to

the effective assistance of appellate counsel. In that habeas case, the Petitioner alleged ineffective assistance of counsel on appeal and the Supreme Court extended their rulings in *Cronic* and *Strickland* to include appellate counsel. The Court reasoned that in pursuing an appeal, a criminal defendant is facing an adversarial proceeding, and an unrepresented appellant is unable to protect his vital interests. In this case, the appellant had "nominal" representation, yet nominal representation does not suffice to render appellate proceedings constitutionally adequate. An appellant whose counsel provides ineffective assistance is in no better position than an appellant who has no counsel at all. *Id.* at 396.

Because of appellate counsel's failure to raise any issues on appeal other than sufficiency of the evidence, even if the issue does not fall with the ambit of *Cronic*'s presumption of prejudice, the prejudice should be obvious to this Court. Appellate counsel specifically waived all listed, but unbriefed or argued issues. This cannot be considered sound appellate strategy. It is not a matter of appellate counsel simply finding no merit to the issues and deciding not to raise them as he did list them in an apparent (though futile) attempt to "preserve" them. For this reason, appellate counsel's assistance was deficient. Had these issues been raised, the result of Mr. Pratt's direct appeal would have been different as his custodial statement was involuntary, the custodial statements of his accomplices were admitted against him in violation of the Confrontation Clause and the trial court impermissibly limited discovery of potentially exculpatory evidence relevant to impeach the credibility of his accomplices, evidence that was especially important in light of their unavailability at trial.

CONCLUSION

For all the above and foregoing reasons, the Petitioner respectfully requests that the Supreme Court grant review of this matter.

Respectfully submitted,

ROGER L. FALK*
CHRISTOPHER L. HUGHES
THE LAW OFFICE OF
FALK & OWENS, P.A.
301 West Central
Wichita, Kansas 67202-1077
(316) 265-5115

Counsel for Petitioner

APPENDIX

APPENDIX A – ORDER AND JUDGMENT OF THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT DATED AUGUST 10, 2004

UNITED STATES COURT OF APPEALS,
TENTH CIRCUIT.

No. 03-3130.

Aug. 10, 2004.

David Royce **PRATT**,

Petitioner-Appellant,

v.

Mike NELSON, Warden; Attorney General of Kansas,

Respondents-Appellees.

Before *KELLY*, Circuit Judge, *BRORBY*, Senior Circuit Judge, and BRISCOE, Circuit Judge.

ORDER AND JUDGMENT*

MARY BECK BRISCOE, Circuit Judge.

After examining the briefs and appellate record, this panel has determined unanimously that oral argument would

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* This order and judgment is not binding precedent, except under the doctrines of law of the case, res judicata, and collateral estoppel. The court generally disfavors the citation of orders and judgments; nevertheless, an order and judgment may be cited under the terms and conditions of 10th Cir. R. 36.3.

not materially assist the determination of this appeal. *See* Fed. R.App. P. 34(a)(2); 10th Cir. R. 34.1(G). The case is therefore ordered submitted without oral argument.

David Royce **Pratt** appeals from the denial of his habeas corpus petition brought under 28 U.S.C. § 2254. Mr. **Pratt** was convicted after a bench trial of two counts of aggravated burglary, aggravated criminal sodomy, rape, attempted rape, two counts of aggravated kidnaping, two counts of aggravated robbery, and two counts of aggravated battery arising from two separate crime sprees. He was sentenced to two consecutive life sentences for the aggravated kidnapings as well as to several concurrent sentences for the remaining convictions. The Kansas Supreme Court affirmed his convictions and sentences on direct appeal. Subsequently, the Kansas Court of Appeals also affirmed the denial of his state application for post-conviction relief, and the Kansas Supreme Court denied review. Having exhausted his state-court remedies, Mr. **Pratt** then filed a petition for a writ of habeas corpus in the United States District Court for the District of Kansas. The court did not conduct an evidentiary hearing, basing its decision solely on the state-court record.

Following the district court's denial of his habeas petition, Mr. **Pratt** filed the instant appeal in this court. We granted a certificate of appealability (COA) on the issue of whether Mr. **Pratt** had received constitutionally ineffective assistance of trial and appellate counsel. With respect to these issues, Mr. **Pratt** claims that (1) counsel failed to seek suppression of Mr. **Pratt's** custodial statement; (2) counsel failed to request a jury trial or to adequately explain the right to a jury trial to him; (3) counsel failed to seek suppression

of DNA and other evidence; and (4) appellate counsel failed to argue these issues and others on direct appeal. In its memorandum and order denying relief, the district court applied 28 U.S.C. § 2254(d)(1) and (2) in its review of the state court's rulings. We agree with the district court's conclusions and AFFIRM the denial of Mr. **Pratt's** habeas petition.

APPENDIX B — MEMORANDUM AND ORDER OF THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF KANSAS DATED MARCH 27, 2003

IN THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF KANSAS

CASE NO. 99-3321-SAC

DAVID ROYCE PRATT,

Petitioner,

v.

MIKE NELSON, Warden, et al.,

Respondents.

MEMORANDUM AND ORDER

This matter is before the court on a petition for habeas corpus filed pursuant to 28 U.S.C. § 2254. The court has examined the pleadings and the state court records and enters the following findings and order.

Background

Petitioner was convicted in the District Court of Sedgwick County, Kansas, of aggravated burglary, aggravated criminal sodomy, rape, attempted rape, aggravated kidnaping, aggravated robbery, and aggravated battery. The convictions

arose from two separate incidents in Wichita, Kansas, in September 1991. The Kansas. Supreme Court summarized these events as follows:

> **September 21, 1991**. During the nighttime hours of September 21, 1991, defendant and Darron Edwards entered the Wichita residence of 64-year-old M.C. and her 92-year-old mother, R.C. M.C. was beaten, raped, and sodomized. Both women were forced into M.C.'s automobile and driven to Emporia. On the way, Edwards attempted to again rape M.C. From this incident Pratt was convicted of aggravated burglary. (K.S.A. 1992 Supp. 21-3716); aggravated criminal sodomy (K.S.A. 21-3506); rape (K.S.A. 21-3502); attempted rape (K.S.A. 21-3502, K.S.A-. 1992 Supp. 21-3301); and two counts of aggravated kidnaping (K.S.A. 21-3421).
>
> . . . .
>
> September 26, 1991. Defendant and Michael Graff entered the Wichita residence of an elderly couple, Omer and Mina Lindamood. Both residents were beaten, and items were taken from their residence. From this incident, defendant was convicted of aggravated burglary (K.S.A. 1991 Supp. 21-3716); two counts of aggravated robbery (K.S.A. 21-3427); and two counts of aggravated battery (K.S.A. 21-3414). State v. Pratt, 876 P.2d 1390, 1391-92 (Kan. 1994).

Appendix B

Following a direct appeal, and an action for post-conviction relief filed pursuant to K.S.A. 60-1507, petitioner seeks habeas corpus relief on the following grounds: (1) insufficiency of the evidence, (2) violations of the Fourth Amendment, (3) violations of the Confrontation Clause, (4) ineffective assistance of counsel, (5) unfair sentencing, and (6) denial of due process.

Discussion

This matter is governed by the-Antiterrorism and Effective Death Penalty Act of 1996 (AEDPA). *See Paxton v. Ward*, 199 F.3d 1197, 1204 (10th Cir.1999) (AEDPA applies to habeas corpus actions filed after April 24, 1996, regardless of the date of the criminal trial underlying the conviction).

Under the AEDPA, if a claim is adjudicated on its merits in state court, a petitioner may obtain federal habeas relief only if he shows the state court decision "was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States," or "was based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding." 28 U.S.C. 2254(d)(1), (2).

A state court decision is "contrary to" clearly established federal law "if the state court arrives at a conclusion opposite to that reached by this Court on a question of law or if the state court decides a case differently than this Court has on a set of materially indistinguishable facts." *Williams v. Taylor*, 529 U.S. 362, 364-65 (2000). A state court decision presents an unreasonable application of federal law "if the state court

identifies the correct governing legal principle from this Court's decision but unreasonably applies that principle to the facts of the prisoner's case." *Id.* at 365.

Procedurally defaulted claims

Respondents first assert petitioner's claims alleging insufficiency of the evidence, violations of the Fourth Amendment, and violations of the Confrontation Clause, are barred by procedural default. Petitioner counters that any procedural default is excusable due to exceptional circumstances, namely, ineffective assistance by his appellate counsel.

Generally, when a state prisoner has defaulted federal claims in state court under an independent and adequate state procedural rule, federal habeas review of the claims is barred unless the prisoner establishes both cause for the default and actual prejudice as a result of the alleged violation of federal-law. Alternatively; the prisoner may overcome procedural default by establishing that the failure to consider the claims will result in a fundamental miscarriage of justice. *Coleman v. Thompson*, 501 U.S. 722, 750 (1991).[1]

If petitioner establishes his assertion of ineffective assistance, he may demonstrate cause for the procedural default. *See Murray v. Carrier*, 477 U.S. 478, 488 (1986).

1. To assert a fundamental miscarriage of justice in this context, petitioner must "supplement[] his constitutional claim with a colorable showing of factual innocence." *Brecheen v. Reynolds*, 41 F.3d 1343, 1356-57 (10th Cir. 1994) (quoting *Herrera v. Collins*, 506 U.S. 390, 404 (1993)). Petitioner had made no such showing.

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In his postconviction action filed pursuant to K.S.A. 601507, petitioner claimed his appellate counsel provided ineffective assistance by failing to brief or argue ten issues included in the appellate brief. Due to that failure, the Kansas Supreme Court, concluded these ten issues were abandoned and did not consider them in determining petitioner's direct appeal.

The Kansas Court of Appeals rejected petitioner's claim that his appellate counsel provided ineffective assistance by failing to preserve the ten issues. The Court of Appeals applied the two-part inquiry developed in *Strickland v. Washington*, 466 U.S. 668 (1984), which requires a determination that counsel's performance fell below a standard of objective reasonableness and that the petitioner was prejudiced by this conduct. The second determination requires the court to determine that there is a reasonable probability that absent the defective performance of counsel, the appeal would have been successful.

The Kansas Court of Appeals found petitioner had failed to support his claim of ineffective assistance of counsel. While petitioner's motion under K.S.A. 60-1507 stated his appellate counsel could identify no case law or other justification for the abandoned issues, the Court of Appeals rejected the claim of ineffective assistance because there was neither citation to the record, "any document or pleading from his direct appeal", nor any explanation of what issues had been abandoned by appellate counsel. *Pratt v. State*, No. 79,484, pp. 10-11 (Kan. Ct. App. 7/2/99).

Appendix B

Because the Kansas Court of Appeals identified the correct legal standard for analyzing the claim of ineffective assistance, and because its determination of the claim was a reasonable analysis of the record before it, this court finds no basis to disturb its finding. This court agrees the claims in question have been procedurally defaulted and finds no support on the record to establish cause and prejudice to excuse that procedural default. Therefore, the defaulted claims may not be examined in this action for federal habeas corpus relief.

The remaining claims asserted by petitioner allege he received ineffective assistance of counsel at trial and on appeal; his sentence is unconstitutional; and that he was denied due process when the state district court failed to conduct a hearing on his motion under K.S.A. 60-1507.

Ineffective assistance of counsel

Petitioner's assertions of ineffective assistance involve six specific allegations of error: (1) counsel's failure to seek a change of venue due to extensive, prejudicial pretrial publicity; (2) counsel's failure to seek suppression of petitioner's custodial statement; (3) counsel's failure to request a jury trial or to explain the right to a jury trial to petitioner; (4) counsel's failure to adequately advise petitioner concerning plea negotiations and waiver of a jury trial; (5) counsel's failure to move for suppression of DNA and other evidence; and (6) appellate counsel's failure to brief and argue the issues in the appellate brief or to file a reply brief.

Appendix B

Petitioner's claim that counsel failed to move for the suppression of his statement, and his claim that counsel failed to advise him concerning plea negotiations are procedurally defaulted, as petitioner failed to present these claims on collateral appeal. This court therefore does not reach these two claims. The remaining claims, however, were properly presented to the state courts and may be considered on habeas corpus review.

Change of venue

The Kansas Court of Appeals found no error in the failure to seek a change of venue, finding that "[s]uch strategic and tactical decisions are the exclusive province of the lawyer after consultation with his client." *Pratt v. State*, No. 79,484, p. 5.) The Court of Appeals also found petitioner had not made the requisite evidentiary showing to support his claim that a change of venue was necessary to protect his rights. *Id.*

To establish his claim of ineffective assistance on this point, petitioner must demonstrate the trial court would have, or should have, granted a motion to change venue. This showing requires evidence of prejudice on the part of jurors. *See Hale v. Gibson*, 227 F.3d 1298, 1332 (10th Cir. 2000).

The court agrees petitioner has not made a sufficient showing to warrant relief on this claim. While he broadly asserts a change of venue was required due to the age of the victims, the brutal nature of the crimes, and pretrial publicity, he presents no persuasive support for the claim that counsel should have presented a motion for change of venue,

particularly in light of the fact that this matter was tried to the court.

Right to a jury trial

Petitioner next contends counsel provided ineffective assistance by failing to explain the right to a jury trial adequately or to request a jury trial. The Kansas Court of Appeals examined the record and found petitioner waived his right to a jury trial in open court. *Pratt, id.*, at p. 4.

It is settled that "the accused has the ultimate authority to make certain fundamental decisions regarding the case, as to whether to plead guilty, waive a jury, testify in his or her own behalf, or take an appeal." *See Jones v. Barnes*, 463 U.S. 745, 751 (1983). Because a decision concerning whether to request a jury trial is often a matter a trial strategy, for counsel's advice on this point to be constitutionally inadequate, "the decision to waive a jury must have been completely unreasonable, not merely wrong, so that it bears no relationship to a possible defense strategy." *Hatch v. Oklahoma*, 58 F.3d 1447, 1459 (10th Cir. 1995) (internal quotation marks omitted).

Here, although brief, petitioner's waiver of a jury trial in open court satisfied state law. The decision of counsel to recommend trial to the court was a reasonable one, given the circumstances of the crimes, and the court finds no basis to conclude counsel provided ineffective assistance.

Appendix B

Suppression of the evidence

Petitioner next claims counsel provided ineffective assistance by failing to move for the suppression of DNA and other forensic evidence. The evidence in question was presented through the testimony of the prosecution's serology expert, who testified concerning blood group substances found at one of the crime scenes. The evidence did not place petitioner at the crime scene; it merely established that a person with the same blood group as petitioner was at the scene. The Kansas Court of Appeals found the evidence in question is generally accepted and admissible, and it concluded an objection to the evidence would have been overruled. *Pratt*, *id.* at p. 7.) These circumstances do not support a finding of ineffective assistance under *Strickland*.

Failure to brief and argue issues on appeal

Finally, petitioner claims his appellate counsel provided ineffective assistance by failing to brief or argue some issues. As discussed earlier, the Kansas Court of Appeals found no basis to evaluate this claim on its merits because petitioner failed to identify the particular issues or to support his claim that his appellate counsel could find no legal authority for the claims.[2]

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2. To the extent petitioner may argue that he received ineffective assistance of counsel in his action under K.S.A. 60-1507, he states no claim for relief. Under 28 U.S.C. 2254(i), ineffective assistance of counsel in a state or federal post-conviction proceeding is not a ground for relief in federal habeas corpus.

Appendix B

Appellate counsel "need not (and should not) raise every nonfrivolous claim, but rather may select from among them in order to maximize the likelihood of success on appeal." *Smith v. Robbins*, 528 U.S. 259, 288 (2000).

In this case, there was significant evidence of petitioner's guilt, and appellate counsel pursued claims challenging the sufficiency of the evidence, including whether petitioner could be found guilty of specific intent crimes due to his intoxication and whether he was liable as an aider and abettor for a rape committed by a co-defendant after petitioner left the crime scene. Petitioner failed to support his claim of ineffective assistance in his post-conviction action, and the record does not suggest the issues which appellate counsel effectively abandoned were particularly compelling. The court finds no basis for relief is stated.

Excessive sentence

Petitioner next asserts the two consecutive life sentences imposed on him are excessive and unconstitutional. The Kansas Court of Appeals denied relief, finding the sentences were within statutory guidelines and noting the crimes were heinous and the victims were elderly and frail.

Petitioner does not challenge the finding that the sentences were within state sentencing statutes, and this court is bound by the state courts' interpretation of state law unless it violates federal law. *See Estelle v. McGuire*, 502 U.S. 62, 67-68 (1991). The court finds no violation of federal law and concludes petitioner is not entitled to the relief on this claim.

Appendix B

Failure to conduct an evidentiary hearing

Petitioner's final claim is that the state district court erred in failing to conduct a hearing on his motion under K.S.A. 60-1507. Subsection 60-1507 (b) presumes that a hearing will be conducted "[u]nless the motion and files and records of the case conclusively show that the prisoner is entitled to no relief". The Kansas Court of Appeals found no abuse of discretion by the state district court. This court finds no basis for habeas corpus relief is stated by this claim. The decision of the Kansas Court of Appeals is reasonable, and the discretionary decision of the state district court does not give rise to a claim for federal relief. *See Gourley v. McKune*, 44 F.Supp.2d 1158, 1168 (D. Kan. 1999).

Conclusion

For the reasons set forth, the court concludes petitioner is not entitled to relief pursuant to 28 U.S.C. 2254.

IT IS THEREFORE ORDERED the petition for habeas corpus is dismissed and all relief is denied.

Copies of this Memorandum and Order shall be transmitted to the parties.

IT IS SO ORDERED.

DATED: This 27th day of March, 2003, at Topeka, Kansas.

s/ Sam A. Crow
SAM A. CROW
U.S. Senior District Judge

APPENDIX C — MEMORANDUM OPINION OF THE COURT OF APPEALS OF THE STATE OF KANSAS FILED JULY 2, 1999

IN THE COURT OF APPEALS OF THE STATE OF KANSAS

No. 79, 484

DAVID ROYCE PRATT,

Appellant,

v.

STATE OF KANSAS,

Appellee.

MEMORANDUM OPINION

Appeal from Sednick District Court; PAUL W. CLARK, judge. Opinion filed July 2, 1999. Affirmed.

Before MARQUARDT, P.J., PIERRON, J., and GLENN D. SCHIFFNER, District Judge, assigned.

Per Curiam: David Royce Pratt appeals the district court's dismissal of his K.S.A. 60-1507 motion.

After a bench trial, 16-year-old Pratt was convicted of two counts of aggravated kidnapping, one count of attempted rape, one count of rape, one count of aggravate sodomy, two counts of aggravated burglary, two counts of aggravated

robbery, and two counts of aggravated battery. The convictions stem from events that took place over two nights in September 1991. The facts underlying the convictions are well known to the parties and need not be discussed here.

After his conviction, Pratt moved for a new trial. The motion was denied. The motion itself is not included in the record on appeal. Pratt's conviction was affirmed by the Kansas Supreme Court. *State v. Pratt*, 255 Kan. 767, 876 P.2d 1390 (1994). Pratt is serving two consecutive life sentences as well as numerous other concurrent sentences.

Pratt filed a 1507 motion alleging many trial errors and requesting that the district court reverse his conviction. The trial judge denied the motion without a hearing. Pratt appeals.

I. Hearing

Unless the motion and the files and records of the case conclusively show that the prisoner is entitled to no relief, the court shall cause notice thereof to be served upon the county attorney, grant a prompt hearing thereon, determine the issues and make findings of fact and conclusions of law with respect thereto. K.S.A. 60-1507(b). The movant has the burden of establishing the grounds for relief by a preponderance of the evidence. Rule 183(b) (1998 Kan. Ct. R Annot. 197), On appeal, the standard used to review is refusal to grant a hearing is whether the trial court abused its discretion by denying the hearing. *Estes v. State*, 221 Kan. 412, 414, 559 P.2d 392 (1977).

Appendix C

II. Right to Jury Trial

Pratt argues that he did not understand the consequences of a jury trial waiver. He claims that the waiver denied him of his Sixth Amendment right to a trial by jury.

The defendant and prosecuting attorney, with the consent of the court, may submit the trial of any felony to the court. K.S.A. 22-3403(1). In Kansas, the court may accept a jury trial waiver after the defendant has been advised by the court of his or her right to a trial by jury. The defendant must personally waive his right to trial by jury either in writing or in open court for the record. *State v. Irving*, 216 Kan. 588, 590, 533 P.2d 1225 (1975).

Pratt waived his right to a jury trial at a hearing in open court. The trial judge said, "I'm told, Mr. Pratt, that you want to waive your right to jury trial on this case that was filed against you. If you do, you have given up the right to have a jury decide if you are guilty or not guilty and have the trial decided before a Judge; and is that what you want to do?" Pratt responded, "Yes, I do." The trial court then accepted the waiver.

Pratt's jury trial waiver, though brief, was made in accordance with Kansas law. The trial judge informed Pratt of his right to a jury trial, and Pratt gave voluntary consent on the record in open court. Pratt's 1507 motion alleges that all the discussions concerning a jury trial waiver involved trial counsel and Pratt's father. Pratt claims that he was not informed about the waiver until moments before the hearing. There is nothing in the record to support Pratt's claim.

The trial judge did not abuse his discretion when he disposed of this issue without a hearing.

III. Ineffective Assistance of Trial Counsel

Pratt claims he received ineffective assistance of counsel at trial. He alleges that trial counsel: (1) failed to move for a change of venue despite extensive pretrial publicity; (2) elicited the admission of hearsay testimony from codefendants; and (3) failed to move to suppress scientific evidence.

Before counsel's assistance is determined to be so defective as to require reversal of a conviction, two tests must be met. First, the defendant must establish that counsel's performance was deficient. This requires a showing that counsel made errors so serious that counsel's performance was less than that guaranteed to the defendant by the Sixth Amendment to the United States Constitution. Second, the defendant must establish that the deficient performance prejudiced the defense. This requires a showing that counsel's errors were so serious as to deprive the defendant of a fair trial. A court must indulge a strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance. *State v. Rice*, 261 Kan. 567, 598-99, 932 P.2d 981 (1997).

Change of Venue

Pratt's first argument concerning ineffective assistance of trial counsel is the failure of his attorney to request a change of venue. Pratt claims his counsel should have given the trial court the opportunity to address this issue.

Appendix C

The determination of whether to change venue is entrusted to the sound discretion of the trial court. The burden is on the defendant to show prejudice exists in the community, not as a matter of speculation, but as a demonstrable reality. *State v. Jackson*, 262 Kan. 119,128, 936 P.2d 761 (1997).

Pratt's 1507 motion contends that trial counsel considered requesting a change of venue but rejected the idea. Such strategic and tactical decisions are the exclusive province of the lawyer after consultation with his client. *State v. Nunn*, 247 Kan. 576, 581, 802 P.2d 547 (1990). There is nothing in the record to indicate that Pratt did not receive a fair trial in Wichita. Conclusury contentions without evidentiary bases are not sufficient for relief. The motion must set forth a factual background, names of witnesses, or other sources of evidence demonstrating plaintiff's entitlement to relief. *Wright v. State*, 5 Kan. App. 2d 494, 495, 619 P.2d 155 (1980). Pratt's trial counsel did not err by failing to request a change of venue. Pratt is not entitled to a hearing on this issue.

Questioning of Detective Lawson

Pratt's second argument concerning ineffective assistance of trial counsel focuses on the questioning of Detective Lawson about statements given by two of Pratt's codefendants. On appeal, Pratt claims that his trial attorney did not understand the law.

Pratt's attorney elicited helpful evidence when Detective Lawson testified that Moses Jackson told him that Pratt named codefendant Michael Graff as the person who beat

one set of victims. Pratt's attorney was also able to elicit testimony showing that Graff committed suicide. Trial counsel also established that Pratt's codefendants had the motivation to lie when they made statements implicating Pratt.

The decision to question Detective Lawson about statements made by the codefendants was sound trial strategy. The fact that some inculpatory evidence was also admitted does not render counsel's decision incorrect.

Pratt's 1507 motion does not provide any factual support for this argument. *See Wright*, 5 Kan. App. 2d at 495. The trial judge did not abuse his discretion by disposing of Pratt's 1507 motion without a hearing.

Scientific Testimony

Pratt next argues that his trial counsel was ineffective because he failed to move to suppress the scientific evidence presented by the prosecution. The contested evidence came from Mary Ayers, the prosecution's serology expert. Ayers detected blood group substances that could have placed Pratt at one of the crime scenes. Pratt argues that this testimony, which was not scientifically certain, should have been met with an objection from his trial counsel.

Before expert scientific opinion may be received in evidence, the basis of that opinion must be shown to be generally accepted as reliable within the expert's particular scientific field. *State v. Hill*, 257 Kan. 774, 783, 895 P.2d 1238 (1995). In Kansas, blood analysis is generally accepted

as reliable in the scientific community and is admissible on that basis. *State v. Washington*, 229 Kan. 47, 56, 622 P.2d 986 (1981).

Even though Ayers could not definitely place Pratt at the scene, Pratt's blood group was found at one of the crime scenes. Pratt's argument focuses on the weight of the evidence, rather than its admissibility. While another attorney might have objected to the introduction of this evidence, it was certainly acceptable for Pratt's trial counsel to waive any objection. The failure to object did not result in a trial error. The evidence would have been admitted over an objection. Pratt fails to prove either prong of the *Rice* test on this issue. The trial judge did not abuse his discretion when he disposed of this issue without a hearing.

IV. Ineffective Assistance of Appellate Counsel

Pratt also claims ineffective assistance of counsel by his appeal to attorney. The Kansas Supreme Court decision in Pratt's direct appeal stated: "[F]or his final contentions, defendant lists 10 other issues. These issues were neither briefed nor argued and are, accordingly, deemed to have been abandoned. [Citations omitted.]" *Pratt*, 253 Kan. at 773. Pratt contends that appellate counsel's failure to fully brief these issues constitutes ineffective assistance.

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Pratt alleges in his 1507 brief that he was "entitled to have his conviction vacated, set aside or to be resentenced pursuant to K.S.A. 60-1507." He alleges:

> (1) The verdict was against the weight of the evidence because
>
> > (a) the guilty verdict on Count Three (aggravated kidnapping) was inconsistent with the not guilty verdict on Count Seven (aggravated battery);
> >
> > (b) there was insufficient evidence to support his convictions.
>
> (2) He was denied his Fourth Amendment rights to due process of law and a fair trial when the trial court
>
> > (a) erroneously admitted his custodial statement;
> >
> > (b) admitted prejudicial photographs with no probative value; and
> >
> > (c) admitted speculative expert testimony.
>
> (3) He was denied his Sixth Amendment rights under the Confrontation Clause by the trial court's refusal to disclose the full criminal history of codefendants testifying against him.

Appendix C

As a general rule, trial errors are to be corrected by direct appeal and not by a 1507 motion. *Soto v. State*, 23 Kan. App. 2d 85, 89, 927 P.2d 954 (1996). Trial errors affecting constitutional rights may be raised even though the error could have been raised on appeal, provided there were exceptional circumstances excusing the failure to appeal. Rule 183(c)(3) (1998 Kan. Ct. R. Annot. 197).

Pratt acknowledges that these issues should have been raised on direct appeal. Pratt claims that appellate counsel prevented these issues from being considered in the direct appeal. Pratt contends that not raising the issues is error and constitutes exceptional circumstances.

This court examined the exceptional circumstances requirement in *Alires v. State*, 21 Kan. App. 2d 676, 906 P.2d 172 (1995). In that case there was a change in the law while Alires' 1507 motion was pending. This court held that a change in the law constitutes an exceptional circumstance. 21 Kan. App. 2d at 678. See also *Crease v. State*, 252 Kan. 326, 845 P.2d 27 (1993) (exceptional circumstances exist upon discovery of an ex parte conversation between the trial judge and at least one juror).

Pratt requests that this court find that ineffective assistance of appellate counsel constitutes a similar exceptional circumstance. This we cannot do. 1507 motions are not meant to provide a second appeal. We hold that Pratt has not provided this court with exceptional circumstances requiring us to review his alleged trial errors.

Appendix C

For a defendant to be successful in asserting that he was denied affective assistance of counsel on appeal, it must be shown that (1) counsel's performance, based upon the totality of the circumstances, was deficient in that it fell below an objective standard of reasonableness, and (2) the appellant was prejudiced to the extent that there is a reasonable probability that, but for counsel's deficient performance, the appeal would have been successful. *Baker v. State*, 243 Kan. 1, 7, 755 P.2d 493 (1988),

Pratt's 1507 motion states that his appellate counsel "could find no case law or justification" for the abandoned issues. There is no citation to the record for this assertion and it is, therefore, presumed to be unsupported. *McCaffree Financial Corp. v. Nunnink*, 18 Kan. App. 2d 40, 48, 847 P.2d 1321 (1993): Additionally, Pratt's record in this appeal does not include any document or pleading from his direct appeal. We have no way of assessing or determining which issues appellate counsel included in Pratt's direct appeal brief. Pratt states in his 1507 brief that these very issues have been included "and are discussed at length in this appellate brief." Pratt does not articulate in any other way what these "abandoned" issues are.

K.S.A. 50-1507(b) presumes that a hearing will be held unless the records of the case conclusively show that the prisoner is not entitled to relief. Thus, we must examine Pratt's 1507 motion to determine if the records conclusively show that Pratt is not entitled to relief.

Pratt's 1507 violation states that his appellate counsel "made no argument and listed no authority in support of the

fourth set of issues. He also did not present any argument concerning these issues in oral argument before the Supreme Court." Pratt contends that appellate counsel had a duty to at least argue the issues and ask for a change of law or policy based on the facts of the case.

In denying the 1507 motion without a hearing, the trial judge stated, "The movant made these claims on direct appeal. 'Under Kansas law, where an appeal is taken from the sentence imposed and/or conviction, the judgment of the reviewing court is res judicata as to all issues actually raised, and those issues that could have been presented, but were not presented, are deemed waived.'" *State v. Neer*, 247 Kan. 137, Syl. ¶ 2, 795 P.2d 362 (1990). With the record before us, we hold that the trial judge did not abuse his discretion in denying a hearing on Pratt's 1507 motion.

V. Sentencing

Pratt argues that tale trial court erred when it sentenced him to consecutive life sentences. Pratt claims that his young age and lack of criminal record weigh in favor of a lighter sentence.

Pratt was sentenced for crimes occurring before the Kansas Sentencing Guidelines Act was passed. As such, the sentencing judge determines the sentences by exercising his best judgment after considering the sentencing factors, all of the reports, the defendant's background, the facts of the case, and public safety. See K.S.A. 21-4606. A sentence imposed within the statutory guidelines will not be disturbed on appeal if it is within the trial court's discretion and not a

result of partiality, prejudice, oppression, or corrupt motive, *State v. Turner*, 252 Kan. 666, Syl. ¶ 847 P.2d 1286 (1993).

The sentences were within statutory guidelines. Pratt's crimes were heinous; they were targeted against elderly and weak victims. Pratt did not offer any explanation for his behavior but instead blamed his crime spree on drugs, the codefendants, and society. Neither Pratt's 1507 motion, nor his appellate brief, allege that the sentences were motivated by partiality or passion. Pratt merely states that the sentences were too long. This argument is unpersuasive. The sentences of the trial court are affirmed.

Affirmed.

APPENDIX D — OPINION OF THE SUPREME COURT OF KANSAS DATED JULY 8, 1994

SUPREME COURT OF KANSAS

No. 69904.

July 8, 1994.

STATE of Kansas,

Appellee,

v.

David Royce PRATT,

Appellant.

McFARLAND, Justice:

David Royce Pratt appeals his bench trial convictions of 11 felonies arising from two separate incidents.

SEPTEMBER 21, 1991

During the nighttime hours of September 21, 1991, defendant and Darron Edwards entered the Wichita residence of 64-year-old M.C. and her 92-year-old mother, R.C. M.C. was beaten, raped, and sodomized. Both women were forced into M.C.'s automobile and driven to Emporia. On the way, Edwards attempted to again rape M.C. From this incident Pratt was convicted of aggravated burglary (K.S.A.1992 Supp. 21-3716); aggravated criminal sodomy (K.S.A. 21-

3506); rape (K.S.A. 21-3502); attempted rape (K.S.A. 21-3502, K.S.A.1992 Supp. 21-3301); and two counts of aggravated kidnapping (K.S.A. 21-3421). Edwards' convictions arising from this incident were before this court in *State v. Edwards,* 254 Kan. 489, 867 P.2d 355 (1994).

SEPTEMBER 26, 1991

Defendant and Michael Graff entered the Wichita residence of an elderly couple, Omer and Mina Lindamood. Both residents were beaten, and items were taken from their residence. From this incident, defendant was convicted of aggravated burglary (K.S.A.1992 Supp. 21-3716); two counts of aggravated robbery (K.S.A. 21-3427); and two counts of aggravated battery (K.S.A. 21-3414).

SUFFICIENCY OF THE EVIDENCE

For his first claim under this issue, defendant contends that, by virtue of his voluntary intoxication, he lacked the specific intent necessary for his convictions of:

1. aggravated burglary,

2. aggravated kidnapping,

3. aggravated battery, and

4. rape and aggravated criminal sodomy (convicted as an aider and abettor in these two offenses).

Appendix D

The standard of review when the sufficiency of the evidence is challenged on appeal is whether, after review of all the evidence, viewed in the light most favorable to the prosecution, the appellate court is convinced that a rational factfinder could have found defendant guilty beyond a reasonable doubt. *State v. Wacker,* 253 Kan. 664, Syl. ¶ 4, 861 P.2d 1272 (1993); *State v. Stone,* 253 Kan. 105, Syl. ¶ 2, 853 P.2d 662 (1993); *State v. Tucker,* 253 Kan. 38, Syl. ¶ 3, 853 P.2d 17 (1993). The appellate court looks only to the evidence in favor of the verdict to determine if the essential elements of a charge are sustained. *State v. Patterson,* 243 Kan. 262, Syl. ¶ 1, 755 P.2d 551 (1988); *State v. Willis,* 240 Kan. 580, 587, 731 P.2d 287 (1987); *State v. Pink,* 236 Kan. 715, 729, 696 P.2d 358 (1985).

Voluntary intoxication is neither an excuse for nor a justification of crime. In specific intent crimes, however, voluntary intoxication *769 may be raised as a defense. *State v. Gonzales,* 253 Kan. 22, Syl. ¶ 1, 853 P.2d 644 (1993).

K.S.A. 21-3208(2) provides:

> "An act committed while in a state of voluntary intoxication is not less criminal by reason thereof, but when a particular intent or other state of mind is a necessary element to constitute a particular crime, the fact of intoxication may be taken into consideration in determining such intent or state of mind."

Specific intent as an element of the crime charged is normally a question of fact for the finder of fact to determine

and may be shown by acts, circumstances, and inferences reasonably deducible therefrom and need not be established by direct proof. *State v. Dubish,* 234 Kan. 708, 716, 675 P.2d 877 (1984). As this was a bench trial, the trial judge was the finder of fact.

Defendant contends that the testimony of Dr. R. Burney White established his inability to form the requisite intent necessary for conviction of the specific intent crimes because of his voluntary intoxication. White, who is certified in addictive medicine, testified that, prior to interviewing defendant, he reviewed defendant's school and medical records. Meeting with defendant for "a little over an hour," White reviewed defendant's life history, his chemical use history, his physical abnormalities, and his emotional difficulties. When White asked what drugs he had been using, defendant answered "everything," including butane, marijuana, cocaine, speed, and alcohol, prior to the September 21 and September 26, 1991, incidents. White testified concerning the synergistic effect of combining cocaine and alcohol: "[Y]ou feel more alive but if you go over the edge you become sufficiently deranged, you can't make any plans but you're still awake and moving about." White was unaware of any minimal amounts of an alcohol-cocaine mix which would cause this condition, stating, "[I]t's an unpredictable response with relatively small amounts because they augment each other." White stated that mixing cocaine and alcohol formed a toxic, brain-damaging agent called cocaethylene.

White did not question defendant concerning his memory of events that led to the charges against defendant. White

further stated that when defendant told his story of events in his life, he either chose to ignore the incidents or he did not remember what had occurred on the nights in question. White opined that defendant would, under these circumstances of mixing alcohol and cocaine, be unable to form the requisite intent because he was too sick. On cross-examination, White admitted that doctors do not, on a regular basis, offer an opinion concerning specific intent in a past event because there is no testing instrument for determining intent.

The finder of fact also had before it considerable evidence of defendant's words and actions during the commission of the crimes from which he could determine whether or not the State had proven the element of specific intent. M.C.'s first contact with Pratt and Edwards was when they entered her bedroom and disabled her telephone. The two men were conversing as they went back downstairs. She followed them out of concern for her elderly mother, who was in a downstairs bedroom. When she arrived, R.C. had been tied to the bed. Pratt then confronted her, asking if she had a VCR, camcorder, or camera. When M.C. answered in the negative, Pratt struck her twice in the face and kicked her after she fell. While Edwards was raping and sodomizing M.C., defendant spent much of the time ransacking the house looking for valuables. He complained that the home offered so few pawnable items that it was like a convent. Defendant was present part of the time in the room when Edwards was sexually assaulting M.C. and also actively participated in the kidnapping of the two women. As M.C. was being taken to the automobile, Pratt noticed a necklace she was wearing. Pratt asked her if it was a gold chain. When she answered that it was, he yanked it from her neck and put it in his pocket.

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At the Lindamood residence, defendant was armed with a shotgun. He knocked out Mr. Lindamood with the butt of the gun after being told by Graff to take care of the man so he would not make any noise. Mrs. Lindamood received skull fractures from a beating during the robbery. Various items of value were taken from the Lindamood home.

There was sufficient evidence from which the finder of fact could conclude that the State had met its burden of proof on specific intent. The finder of fact could reasonably have concluded that the defendant entered both residences with the intent to take items of value from their occupants and did so take property using force to accomplish this purpose. The evidence also supports a finding of the necessary intent for the conviction as an aider and abettor of the sex crimes against M.C. and as a principal in the kidnappings. Sufficient evidence was present from which the finder of fact could have concluded defendant was an active participant in all crimes involved in this issue and had the requisite specific intent for their commission.

For his next claim, defendant contends there was insufficient evidence to support his conviction for attempted rape. As previously noted, defendant was an active participant in forcing M.C. and R.C. into M.C.'s automobile. Edwards was the driver. M.C. was in the passenger seat. Defendant was in the back seat with R.C. Before the vehicle left Wichita, defendant exited the vehicle at a traffic signal. There was evidence he left the vehicle because he was sick and/or believed Edwards was going to leave the state, which

defendant did not want to do.

On this claim, defendant argues:

> 1. By virtue of his voluntary intoxication there was insufficient evidence of the specific intent necessary to convict him as an aider and abettor of the attempted rape;
>
> 2. the crime was not foreseeable; and
>
> 3. he had withdrawn from the criminal enterprise prior to the commission of the crime in question.

The first point on this claim has been determined adversely to defendant earlier in this opinion.

As to the foreseeable point, K.S.A.1992 Supp. 21-3205 provides:

> "(1) A person is criminally responsible for a crime committed by another if such person intentionally aids, abets, advises, hires, counsels or procures the other to commit the crime.
>
> "(2) A person liable under subsection (1) hereof is also liable for any other crime committed in pursuance of the intended crime if reasonably foreseeable by such person as a probable consequence of committing or attempting to commit the crime intended.

> "(3) A person liable under this section may be charged with and convicted of the crime although the person alleged to have directly committed the act constituting the crime lacked criminal or legal capacity or has not been convicted or has been acquitted or has been convicted of some other degree of the crime or of some other crime based on the same act."

The attempted rape was clearly foreseeable by defendant. Edwards had already raped and sodomized M.C. in her residence. Further, M.C. was under Edwards' control in the ongoing kidnapping, and he was leaving the city with her. M.C.'s mother, 92-year-old R.C., was very infirm and in no condition to give aid to or prevent further harm to her daughter. We find no merit on this point.

Defendant's final point is that he had withdrawn from the crime spree before the attempted rape was committed and, accordingly, could not be convicted as an aider and abettor to that crime. Defendant cites no authority in support of this point.

In *People v. Brown,* 26 Ill.2d 308, 186 N.E.2d 321 (1962), four men, at least two of whom were armed, entered into a building, announced that it was a stickup, and told the individuals present to lie on the floor. Brown argued he had withdrawn from the scene prior to the felony murder of one of the victims. The Illinois Supreme Court stated:

> "Defendant's initial contention that he is not guilty of murder because he had abandoned and

withdrawn from the criminal enterprise of his companions must fail in two respects. We held in *People v. Rybka,* 16 Ill.2d 394, 406 [158 N.E.2d 17 (1959)], that it is 'the communication of intent to withdraw and not the naked fact of withdrawal that determines whether one who advised, encouraged or incited another to commit a crime is to be released from liability as an accessory before the fact.' To this need may be added the further requirement that the withdrawal must be timely, that is to say it must be 'such as to give his coconspirators a reasonable opportunity, if they desire, to follow his example and refrain from further action before the act is committed,' and it must be possible for the trier of fact 'to say that the accused had wholly and effectively detached himself from the criminal enterprise before the act with which he is charged is in the process of consummation or has become so inevitable that it cannot reasonably be stayed.' (*People v. Nichols,* 230 N.Y. 221, 129 N.E. 883, 886 [(1921)]; also see *Galan v. State,* 44 Ohio App. 192, 184 N.E. 40 [(1932)].) Stated otherwise, withdrawal may not be effectively made from a felony murder when the 'transaction which begets it has actually been commenced.' *People v. Nichols,* 230 N.Y. 221, 129 N.E. 883, 886 [(1921)]." 26 Ill.2d at 312-13, 186 N.E.2d 321.

Defendant actively participated in and aided in the aggravated kidnappings which were in progress when he left the vehicle. There is no evidence that he left because he

wanted no further involvement in criminal activity. Rather, defendant left because he felt physically sick and/or did not want to leave the state. Crimes he had aided in starting in motion continued in his absence with the foreseeable result. An aider and abettor does not have to be physically present when the crime is committed. We conclude there was sufficient evidence to support the attempted rape conviction herein.

UNBRIEFED AND UNARGUED ISSUES

For his final contentions, defendant lists 10 other issues. These issues were neither briefed nor argued and are, accordingly, deemed to have been abandoned. See *State v. Smith,* 245 Kan. 381, Syl. ¶ 6, 781 P.2d 666 (1989); *State v. Words,* 226 Kan. 59, 63, 596 P.2d 129 (1979); *State v. Mims,* 222 Kan. 335, Syl. ¶ 6, 564 P.2d 531 (1977).

The judgment is affirmed.